IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 340

PIETRO CINGRIGRANI, et al.,
Petitioners,

vs.

B. H. HUBBERT & SON, INC.,
Respondent.

ANSWER AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

The respondent, B. H. Hubbert & Son, Inc., opposes the petition of Pietro Cingrigrani, et al., for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE MATTER INVOLVED

This suit was instituted by the petitioners herein against the respondent, their employer, in the United States District Court for the District of Maryland. The original complaint, filed prior to the enactment of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C.A. Secs. 251, *et seq.*, was

based on activities similar to those involved in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946) and sought to recover from the respondent overtime pay, liquidated damages and attorney's fees alleged to be due the petitioners under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A., Secs. 201 *et seq.* After the Portal-to-Portal Act was enacted into law, the petitioners filed an amended complaint to give effect to Section 8 (Pending Collective and Representative Actions) of that Act with respect to the naming of the individual plaintiffs but which was, in all other respects, substantially the same as their original complaint. There is no allegation in the amended complaint that the petitioners herein were not paid the minimum wage prescribed by the Fair Labor Standards Act. Nor does the amended complaint include any allegation that any of the activities for which the petitioners seek compensation were compensable by contract, custom or practice.

Whereupon, the respondent filed its motion, supported by affidavit, to dismiss the amended complaint upon the ground that, under Sections 2(a) and (d) (Relief from Certain Existing Claims) of the Portal-to-Portal Act, it failed to state a claim upon which relief could be granted and of which the court had jurisdiction because said amended complaint did not allege that the activities for which compensation was sought were compensable by contract, custom or practice and because, as shown by the affidavit filed with the motion to dismiss, the activities for which compensation was sought by the amended complaint were not such activities as were compensable by contract, custom or practice. The District Court granted the motion to dismiss and the Circuit Court of Appeals for the Fourth Circuit, in a per curiam opinion, affirmed.

According to the petition for writ of certiorari filed herein, this case presents "serious questions" relating to the constitutionality of the Portal-to-Portal Act. As a matter of fact, only Section 2 of that statute is involved, because that section alone was the basis of respondent's motion to dismiss the amended complaint (R. 10-11). The petitioners argued unconstitutionality before the District Court and before the Circuit Court of Appeals. In both tribunals these arguments were considered and rejected. Now the petitioners seek to rehearse these arguments before this Honorable Court.

THE QUESTIONS PRESENTED

1. Is Section 2 of the Portal-to-Portal Act consistent with the due process clause of the Fifth Amendment?

2. Is Section 2 of the Portal-to-Portal Act consistent with the provisions of Article III of the Constitution?

REASONS FOR OPPOSING THE GRANTING OF THE WRIT

This case presents no special or important reasons why it should be reviewed by this Honorable Court on writ of certiorari. The petitioners have already put the respondent to unnecessary and uncalled for expense in defending these actions in the District Court and in the United States Court of Appeals. There has been no impairment of any constitutional rights of the petitioners. They have had their day in court.

The importance of the Fair Labor Standards Act and of the Portal-to-Portal Act amendment to it are admitted by the respondent. But this Honorable Court has already upheld the constitutionality of the original act in *United States v. Darby,* 312 U. S. 100 (1941), and the Portal-to-Portal Act amendment thereto was enacted in furtherance

of the same constitutionally delegated purpose: the regulation of interstate commerce. As will be shown in the appended brief, the decision below (168 F. 2d 993) is not only in conformity with the applicable decisions of this Honorable Court but is also in conformity with the decisions of other circuit courts of appeals *on this very same point.* The Portal-to-Portal Act became law scarcely more than seventeen months ago. Yet the circuit courts of appeals of three circuits have already upheld the validity of the very section which petitioners now seek this Honorable Court to re-review. *Battaglia v. General Motors Corporation,* 169 F. 2d 254 (C.C.A. 2d July 8, 1948) cert. applied for Sept. 29, 1948; *Seese v. Bethlehem Steel Co.,* 168 F. 2d 58 (C.C.A. 4th May 5, 1948); *Fisch v. General Motors Corp.,* 169 F. 2d 266 (C.C.A. 6th August 2, 1948) cert. applied for October 25, 1948. And, over one hundred decisions of federal district and state courts have, on this same question, reached the same result.

Manifestly, it is the solemn duty of this Honorable Court to strike down any federal statute which is in conflict with the United States Constitution. And it is likewise incumbent upon this Honorable Court to pass upon and review statutes presenting grave doubts of constitutionality. On the other hand, it is evident that the business of this Court cannot be blocked, tied-up and thwarted every time a petitioner raises the cry "unconstitutional" if, in fact, no constitutional question is present. The phrases "baldly confiscatory statute" and "naked political power" are only too well known by this Honorable Court and have a familiar ring. At no time, however, in the history of our federal courts has a single question been so thoroughly litigated with a result so unanimous as the question that the petitioners seek this Court to further review. The constitutionality of Section 2 of the Portal-

to-Portal Act is not an unsettled issue. Its constitutionality has already been settled beyond doubt by the independent and unanimous action of the various federal and state courts throughout this country. This Honorable Court can best serve its constitutional function in the matter at issue by exercising its sound judicial discretion in denying the petition for writ of certiorari.

Respectfully submitted,

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Respondent.

BRIEF OPPOSING THE GRANTING OF THE WRIT OF CERTIORARI

STATEMENT OF THE CASE

In February, 1947, swept along by the flood of so-called "portal-to-portal" suits let loose by the decision of this Court in the *Mt. Clemens Pottery Co.* case, *supra*, the petitioners herein filed suit in the United States District Court for the District of Maryland to recover from the respondent over-time pay, liquidated damages and attorney's fees alleged to be due them under the Fair Labor Standards Act of 1938, from the date of the enactment of that Act to the date of filing suit. Their original complaint was filed in the name of Albert Atallah, District Director, District 8, United Steelworkers of America (C.I.O.), for and on behalf of certain employees and other similarly situated; John Scordo, and Howard Shryock, President and Record-

ing Secretary, respectively, United Steelworkers of America (C.I.O.), Local Union No. 3906, for and on behalf of themselves individually, certain employees and others similarly situated.

Following the filing of the original complaint, the respondent moved to dismiss those parts of the alleged causes of action which conclusively appeared on the face of the complaint to have been barred by the applicable Maryland statute of limitations; and in May, 1947, the District Court dismissed that part of the original complaint which stated alleged causes of action which accrued more than three years prior to the date said complaint was filed (R. 1).

On May 14, 1947, the Portal-to-Portal Act of 1947 was approved by the President of the United States and became law. Thereafter, the respondent filed its answer in which it set forth, among other defenses, that (1) under the Portal-to-Portal Act the complaint failed to state a claim upon which relief could be granted, and (2) the Court did not have jurisdiction to enforce any liability in respect to the claims asserted, in that the activities for which compensation was claimed were not such activities as were compensable by either contract, custom or practice (R. 1, 15-16).

In September, 1947, with leave of the Court and counsel for the respondent obtained, the petitioners herein filed an amended complaint to give effect to Section 8 (Pending Collective and Representative Actions) of the Portal-to-Portal Act with respect to the naming of the individual plaintiffs but which was, in all other respects, substantially the same as the original complaint filed herein. It appears from the amended complaint that the overtime work for which compensation is claimed is in the nature

of what has popularly been termed, since the decisions of this Honorable Court in *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590 (1944), *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161 (1945), and *Anderson v. Mt. Clemens Pottery Co., supra*, as "portal-to-portal" activities.

The amended complaint alleges that the employees were required to be at their respective places of work at scheduled starting times and to remain at work until their scheduled quitting times, and that it was necessary for the employees, before their scheduled starting times, to walk on their employer's premises to time clocks located at designated places, to wait to punch said time clocks, to walk from the said time clocks to their respective places of work; and, after their scheduled quitting times, to reverse this procedure (R. 5-6). The amended complaint also alleges that it was necessary for the employees, before their scheduled starting times, to equip themselves with clothing and tools suitable for work, and, after their scheduled quitting times, to wash up, change into street clothes and return their equipment (R. 6). The amended complaint also alleges that the employees were unable to use their lunch and rest periods solely to their own interests, that they were "required, permitted or suffered" to wait for their wages, to report to an alleged Labor Relations Office of their employer and to first aid and medical offices designated by their employer (R. 7, 8). Nowhere is there any allegation or contention that the petitioners herein were not paid the minimum wage prescribed by the Fair Labor Standards Act; nor is there any allegation or contention that any of the activities for which the petitioners seek compensation were compensable by a written or non-written contract or by a custom or practice in effect at the time of such activities.

The respondent then filed a motion to dismiss this amended complaint on the ground that, under Sections 2(a) and (d) of the Portal-to-Portal Act, it failed to state a claim upon which relief could be granted and of which the court had jurisdiction because said amended complaint failed to allege that the activities for which compensation was sought were such activities as were compensable by contract, custom or practice and because, as was shown by an affidavit filed with the motion to dismiss, the activities for which compensation was sought by the amended complaint were not such activities as were compensable by contract, custom or practice (R. 10-11). The petitioners did not seek to further amend so as to bring themselves within Sections 2(a) and (d) of the Portal-to-Portal Act. Nor did they see fit to file opposing affidavits.

On November 25, 1947, the District Court entered a final order dismissing the amended complaint (R. 14). On appeal by the petitioners herein to the United States Court of Appeals for the Fourth Circuit, that Court, in a *per curiam* opinion, on July 7, 1948, affirmed the judgment below (R. 18, 19).

THE BACKGROUND HISTORY

The background history of the Portal-to-Portal Act is a familiar one. Ten years ago an investigation by the members of Congress disclosed the existence of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers in industries engaged in commerce or in the production of goods for commerce. Specifically, it was found that sub-standard wages which were being paid employees in some industries engaged in commerce or in the production of goods for commerce prevented other industries engaged in similar activities from raising their

labor standards because of competition with the industries employing labor under sub-standard conditions. Accordingly, the Congress found that these conditions caused commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate these conditions and that they resulted in a burden to commerce, constituted an unfair method of competition in commerce, led to labor disputes burdening and obstructing commerce and interfered with the orderly and fair marketing of goods in commerce. To correct these conditions, Congress enacted the Fair Labor Standards Act of 1938 (29 U. S. C. A. Secs. 201, 202).

It is common knowledge and beyond the pale of argument that the Fair Labor Standards Act has achieved successful and beneficial results in the field of interstate commerce. This court upheld the constitutionality of that Act in *United States v. Darby, supra,* and has considered and interpreted it in deciding numerous cases arising under that statute.

In phrasing the language of a statute, however, Congress is not always able to anticipate and provide for every possible contingency which may develop and present itself upon construction and application of that statute. A vivid example of the failure of Congressional foresight is evident in the portal-to-portal issue now before us. When Congress enacted the Fair Labor Standards Act in 1938, it was unable to foresee the possibility that sometime in the future an employee would use that statute as a tool with which to obtain compensation not previously contemplated by either Congress or employer or employee, for time consumed neither in productive work nor in activities compensable by his employment contract or a custom or practice in effect at his employer's premises. Consequently, when the question of portal-to-portal pay was presented to this Court,

it was held in three decisions culminating in the *Mt. Clemens Pottery* case that preliminary and postliminary activities engaged in by employees on their employer's premises constituted working time under the language of the Fair Labor Standards Act then in effect and were compensable in accordance with the provisions of the Fair Labor Standards Act requiring an employer to pay time and one-half the basic rate of pay for work in excess of the maximum hours per week set forth in that Act. *Tennessee Coal Co. v. Muscoda Local, supra; Jewell Ridge Coal Co. v. Local No. 6167, supra; Anderson v. Mt. Clemens Pottery Co., supra.*

The decision of this Court in the *Mt. Clemens Pottery* case released an avalanche of law suits which were filed throughout this country in federal and state courts. Employers throughout the country, both large and small, many of whom had operated throughout the urgency of the war period in full good faith compliance with the provisions of the Fair Labor Standards Act and their union collective bargaining contracts found themselves besieged with suits totaling an estimated $6,000,000,000.00. Many of these suits were filed by employees who no longer worked for the sued defendant. Some of the parties-plaintiff, satisfied with the job they had done and the high wages which had been paid them during the war period, had long since moved away from their place of employment. Encouraged by their union representatives, who used or intended to use these suits as a lever in bargaining with the employers, many employees were made parties-plaintiff to these actions in spite of their satisfaction with the wages paid them under their contract of employment prior to the *Mt. Clemens* decision. In general, the Mt. Clemens decision was a windfall to the employee. The fact that the employee lost no time in asking for his share of the prize money is indicated

by the numerous portal-to-portal actions which were commenced in the latter part of 1946 and in the early part of 1947.

In the light of this historical background, Congress, acting pursuant to its constitutional authority over interstate commerce, investigated the effect of these numerous suits on the flow of goods in commerce and, as a result of its findings, by an overwhelming vote that cut across party lines, enacted the Portal-to-Portal Act of 1947 as an amendment to the Fair Labor Standards Act of 1938 as amended. The Portal-to-Portal Act became law over the signature of the President on May 14, 1947. A statement of the findings and policy of the Congress is found in Section 1 of the Portal-to-Portal Act as follows:

> "Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall pay-

ments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

"The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."

See also:

H. R. No. 71, February 25, 1947 (1947 U. S. Code Cong. Serv., page 1029, *et seq.*).

ARGUMENT

I.

SECTION 2 OF THE PORTAL-TO-PORTAL ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The petitioners' whole argument, to the effect that Section 2 of the Portal-to-Portal Act is a violation of the due process clause of the Fifth Amendment (Petitioners' brief, pages 18-28) is based upon the premise that the rights which were obliterated by the enactment of the Portal-to-Portal Act were in the nature of vested property rights. Both this premise and the conclusion which petitioners draw therefrom are fallacious and incorrect. In the first place, any right to compensation which the petitioners had prior to the enactment of the Portal-to-Portal Act was based entirely upon a statute—the Fair Labor Standards

Act—which imposed upon employers the duty to pay to their employees compensation for what have become to be known as "portal-to-portal" activities, irrespective of, and, frequently, contrary to and in the teeth of any contract, custom or practice. The obligation to pay was entirely statutory. And the *statutory* obligation, and that alone, is abrogated by Section 2 of the Portal-to-Portal Act. All other obligations of the employer and any vested rights of the employees, those obligations and rights which have for their basis a contract, custom or practice, are specifically retained by the Act.

In the second place, the respondent submits to this Court, it really makes no difference whether the respective rights and obligations of the parties be considered statutory or contractual, because, as will be shown hereafter, even rights secured by contract may be abrogated by Congress acting pursuant to a Constitutional grant of authority.

Section 2 of the Portal-to-Portal Act, relied upon by the respondent in the courts below, provides as follows:

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
>
> "(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> "(2) A custom or practice in effect at the time of such activity, at the establishment or other place where

such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * * *

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to any activity which was not compensable under subsections (a) and (b) of this section."

A. The cause of action eliminated by the Portal-to-Portal Act was merely a statutory right subject to change.

It seems clear that the petitioners would have no basis for recovery for their alleged "portal-to-portal" activities in the absence of any Fair Labor Standards Act. No contract, custom or practice entitling them to compensation for alleged clock-punching time and walking time has been alleged in their complaint. Prior to the enactment of the Portal-to-Portal Act, any hope of recovery which they might have had was grounded on the Fair Labor Standards Act; and any suit for recovery would have had to be brought under the provisions of that statute. The basis of the petitioners right to recover, therefore, was statutory and statutory alone. It is true that any cause of action which they had was superimposed upon their contract of employment. But it was rather a cause of action that

"grew upon" that contract of employment, rather than one which "grew out of" that contract.

If the petitioners' cause of action was a right protected by contract, or custom or practice—and they do not so allege in their complaint—such a cause of action was not destroyed by, but is specifically eliminated from, the provisions of Section 2. Only purely statutory rights are there affected. The difficulty that the petitioners have is this: they are seeking to assert a right to bargain with the Congress in a matter which is fully within that body's jurisdiction. Petitioners argue (Petitioners' brief, page 26) that "the plaintiffs have fully performed their part of the contract." Yet petitioners have alleged no contract with the respondent as the basis for their right to recover. Nor are contractual rights extinguished by Section 2 of the Portal-to-Portal Act. Nor is the Fair Labor Standards Act a contract between the Congress and petitioners, but a statute which, by virtue of the same power that it had to enact it, the Congress could change. *Flanigan v. Sierra County,* 196 U. S. 553, 560 (1905); *Norris v. Crocker,* 13 How. 429, 440 (1851).

Since the Congress may repeal its own act, it may take away that which has no existence save by virtue of that act. *West Side R. Co. v. Pittsburgh Const. Co.,* 219 U. S. 92 (1911); *Pearsall v. Great Northern R. Co.,* 161 U. S. 646 (1896); *Ewell v. Daggs,* 108 U. S. 143, 151 (1883); *National Carloading Corp. v. Phoenix-El Paso Express, Inc.,* 142 Tex. 141, 176 S. W. 2d 564 (1943) cert. den. 322 U. S. 747 (1944).

The *National Carloading* case parallels the case at bar. In the *National Carloading* case the Supreme Court of Texas had under consideration a 1942 act of Congress which retroactively wiped out claims against freight for-

warders for undercharges. The claims abolished in that case had arisen in 1937, based upon the Interstate Commerce Act of 1935. In upholding the 1942 Act in the face of the plaintiff's argument that it was unconstitutional, the Court stated at 176 S. W. 2d 567:

> "We think the Court of Civil Appeals was correct in its conclusion that the quoted section from the 1942 amendment is a complete bar to the recovery of the plaintiff. As above stated, plaintiff's suit is predicated upon Sec. 217 (b) which made it obligatory upon the plaintiff to collect from defendant the full legal tariffs in effect at the time of the shipments, which would mean that the plaintiff should have collected eighty-five cents per hundred pounds unless the defendant was entitled under the Motor Carrier Act to file tariffs and participate in joint rates with plaintiff on the basis of forty-five cents per hundred weight from El Paso to Phoenix. *Therefore, the suit of the plaintiff is not based upon a contract or agreement but arises by reason of special statutory authority.*
>
> "It is generally conceded that a right of action given by a statute may be taken away at any time, even after it has accrued and proceedings have been commenced to enforce it. * * * It is also well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them, and if final relief has not been obtained before the repeal becomes effective, it cannot be granted thereafter, and the repeal deprives the court of jurisdiction of the subject matter." (Emphasis supplied).

This Court denied certiorari, 322 U. S. 747 (1944).

B. Even though the cause of action eliminated by the Portal-to-Portal Act be considered a right based on contract, the provisions of Section 2 are in accordance with due process of law.

It is of little consequence whether the cause of action eliminated by the Portal-to-Portal Act be considered as based on statute or on contract because, as is set forth earlier herein, the important consideration is that Congress, in enacting the Portal-to-Portal Act was acting pursuant to its authority to regulate commerce; and "the exercise of such power is not invalidated even by the fact that its effect is to destroy rights under valid existing contracts." *American Power & Light Co. v. S. E. C.*, 329 U. S. 90 (1946); *North American Co. v. S. E. C.*, 327 U. S. 686 (1946); *Norman v. B. & O. R. Co.*, 294 U. S. 240 (1935); *L. & N. R. Co. v. Mottley*, 219 U. S. 467 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899). The inquiry, then, is not whether or not property rights have been interfered with or destroyed but whether the legislation, here, Section 2 of the Portal-to-Portal Act, destroyed or interfered with such property rights without due process of law.

The power of Congress over interstate commerce is broad and plenary and may be freely exercised to the full extent of the grant expressed in the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1824). It is as broad as the economic needs of the nation. *American Power & Light Co. v. S. E. C., supra*, at page 104. This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. *North American Co. v. S. E. C., supra*, at

page 705. It must be exercised, however, in subjection to the guarantee of due process of law found in the Fifth Amendment. *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 347 (1935); *North American Co. v. S. E. C.*, *supra*, at page 705. That is to say, Congress may not, in the guise of exercising its plenary power over commerce, capriciously take one man's property and give it to another. Nor may it arbitrarily strike down rights arising under contract. When, however, vital national policy which Congress has the power to adopt is at stake, the provisions of the Fifth Amendment may not be invoked to obstruct it. And Congress may constitutionally encroach upon interfering private vested rights, if it does not act arbitrarily or capriciously and adopts reasonably suitable means to accomplish its purposes. *American Power & Light Co. v. S. E. C.*, *supra*, at pages 106-107; *North American Co. v. S. E. C.*, *supra*, at page 708; *Guaranty Trust Co. v. Henwood*, 307 U. S. 247, 259 (1939); *Norman v. B. & O. R. Co.*, *supra*, at pages 306-311; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.*, *supra*, at 176 S. W. 2d 569. Said Chief Justice Hughes in the *Norman* case, *supra*, at page 311:

> "Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. *That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy.* Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. *We may inquire*

whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final. * * *" (Emphasis supplied.)

There is nothing in the result accomplished by the Portal-to-Portal Act which can be condemned as an unreasonable or arbitrary exercise of the commerce power by Congress. As set forth earlier herein, the historical background leading to the enactment of the Act and the results of the investigation made by the Congress and set forth in Section 1 of the Act amply show why the enactment of the Portal-to-Portal Act was necessary to avoid great injury to interstate commerce. The effect of the Act, so far as portal-to-portal activities are concerned, is merely to validate the contracts and agreements between employers and employees which, by virtue of the *Mt. Clemens Pottery* case, were invalid. The result is to prevent employees from reaping a windfall which would be injurious to commerce, the accomplishment of which cannot be deemed an unreasonable or arbitrary exercise by Congress of its power over commerce. The petitioners' argument to the effect that the real economic impact of portal-to-portal payments on the country's employers would not constitute a financial problem of such national concern as to justify the enactment of the disputed statute deals with matters of policy which belong solely to the Congress and not to the Courts. *North American Co. v. S. E. C., supra*, at page 708; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 394 (1940).

Petitioners rely on such cases as *Coombes v. Getz*, 285 U. S. 434 (1932); *Ettor v. Tacoma*, 228 U. S. 148 (1913); *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450 (1864); *Lynch v. United States*, 292 U. S. 571 (1934). All of these

cases are distinguishable, however, because each of them, except the *Lynch* case, arose by reason of the action of a *State* in *unreasonably and arbitrarily* striking down vested rights without a justifying reason for their destruction. In the *Lynch* case, the only one dealing with a Congressional statute, this Court was careful to note that, "The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power." 292 U. S. at pages 579-580. In the case at bar, the Congressional "Findings and Policy" set forth in Section 1 negative any argument of unreasonableness or caprice.

The petitioners have devoted a considerable portion of their brief (Petitioner's brief, pages 28-36) to a denunciation of Section 2(d) of the Portal-to-Portal Act insofar as it withdraws from the District Court jurisdiction of any action or proceeding which seeks to enforce any liability with respect to an activity which is not compensable under Section 2(a). But the Constitution gives Congress power to ordain and establish the inferior courts, (Constitution, Article III, Section 1), and this power includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. *Lockerty v. Phillips*, 319 U. S. 182, 187 (1943). In *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922) this power of Congress to give or to take away the jurisdiction of the lower federal courts was described by this Court as follows:

> "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. *The Mayor v. Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of

> Congress, be taken away in whole or in part, *and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. The Assessors v. Osbornes*, 9 Wall. 567, 575. *A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.*" (Emphasis supplied).

Since, as we have pointed out above, the Congress, in withdrawing from the courts jurisdiction of these claims, acted pursuant to its constitutional authority to regulate commerce and in a way reasonably calculated to effectuate such regulation as it by investigation found necessary, in the light of the needs of the nation, it fully complied with constitutional limitations. It is submitted that Section 2 of the Portal-to-Portal Act does not violate the due process clause of the Fifth Amendment.

II.

SECTION 2 OF THE PORTAL-TO-PORTAL ACT DOES NOT VIOLATE ARTICLE III OF THE CONSTITUTION.

Of even less force is the petitioners' argument that the Portal-to-Portal Act represents an attempt by the Congress to exercise judicial power in violation of the Constitution, Article III, Section 1. It is submitted that the Portal-to-Portal Act meets exactly the distinction made by Justice Holmes in *James v. Appel*, 192 U. S. 129, 137 (1904) and in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908) set forth on page 13 of petitioners' brief. Section 2 of the Act does not deal with the past or purport to grant or refuse a new trial in cases pending at its enactment: it performs the proper legislative function of laying down a rule for the future in a matter as to which it has authority to

lay down rules. Section 2 of the Portal-to-Portal Act does not attempt to change or in any way affect the decision of this Court in the *Mt. Clemens Pottery* case or any other adjudication already made. Nor does it attempt to direct or dictate to the courts in their exclusive exercise of judicial power. Portal-to-portal claims which were reduced to final judgment before the enactment of the Portal-to-Portal Act are not disturbed by Section 2. The net result of Section 2 is a definition of rights, an amendment or limitation placed upon the Fair Labor Standards Act of 1938 so as to take away a cause of action given by it. As this Court stated in *Stockdale v. Insurance Companies*, 20 Wall. 323, 331-2 (1873):

> "Both in principle and authority it may be taken to be established that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, *and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.* * * *
>
> "It is undoubtedly true that, in our system of government, the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts. And it may be conceded that Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute.
>
> *"But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation cannot be material, if the purpose is clear, and that purpose is within the power."* (Emphasis supplied).

Since Congress, for the reasons heretofore stated, otherwise had the power, within the Constitution, to enact the

Portal-to-Portal Act, the fact that one of the Act's incidental effects is to prevent the courts from following the *Mt. Clemens Pottery* case is of no importance.

III.

THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT HAS BEEN OVERWHELMINGLY ACKNOWLEDGED BY THE COURTS.

The weight of authority is not always calculated in numbers. In the case of the Portal-to-Portal Act, however, the overwhelming and unanimous number of decisions of state and federal courts upholding the constitutionality of that Act is a wealth of authority to be reckoned with. If this Honorable Court should decide to accept review of the within case, and thereafter affirm the decision of the Fourth Circuit below, it would seem that there would be little left for it to add to what has already been said and written by the many courts below on the matter here involved. In only two decisions that we have found has any doubt been cast in the direction of constitutionality. These two cases are: *Sveltik v. Vultees Aircraft Corporation* (N. D. Tex Oct. 20, 1947) 13 Labor Cases par. 64,063, 7 W. H. Cases 282 (oral opinion) and *Curtis v. McWilliams Dredging Company*, 78 N.Y. Supp. 2d 317 (New York City Court 1948) (Section 9 of Portal-to-Portal Act construed; no question of "portal-to-portal" activities involved). On the other hand, the decisions of federal district and state courts upholding the constitutionality of the Portal-to-Portal Act and dismissing actions for failure to comply with the terms of Section 2 exceed the hundred mark. Some of these cases have been listed in the appendix hereto as a matter of information. Furthermore, as we have already indicated herein, the United States Courts of Appeals in three

separate circuits have each had under consideration this question of constitutionality and have, on two separate occasions in each circuit, rendered opinions in favor of validity. The six circuit court decisions are:

Battaglia v. General Motors Corporation, 169 F. 2d 254 (C. C. A. 2d July 8, 1948) cert. applied for Sept. 29, 1948 (Section 2 upheld.)

Darr v. Mutual Life Insurance Co. of N. Y., 169 F. 2d 262 (C. C. A. 2d July 8, 1948) cert. applied for Oct. 5, 1948 (Sections 9 and 11 upheld.)

Seese v. Bethlehem Steel Co., 168 F. 2d 58 (C. C. A. 4th May 5, 1948) (Section 2 upheld.)

Atallah v. B. H. Hubbert & Son, Inc., 168 F. 2d 993 (C. C. A. 4th July 7, 1948) cert. applied Oct. 5, 1948 (Per curiam opinion in the case at bar. Section 2 upheld.)

Rogers Cartage Company v. Reynolds, 166 F. 2d 317 (C. C. A. 6th Feb. 16, 1948) (Sections 9 and 11 upheld.)

Fisch v. General Motors Corp., 169 F. 2d 266 (C. C. A. 6th Aug. 2, 1948) cert. applied for Oct. 25, 1948 (Section 2 upheld.)

Each of the above circuit court decisions which is concerned with an examination of Section 2 deals with the same arguments that petitioners here present to this Court. In all cases the petitioners' arguments have been found to be without merit. The respondent submits that a further review of these arguments by this Honorable Court will serve no other purpose than to set astir a matter that the lower federal courts have effectively put at rest.

CONCLUSION

It is submitted that the Writ of Certiorari prayed for should not be granted because there are no special or important reasons for further review.

Respectfully submitted,

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APPENDIX TO RESPONDENT'S BRIEF NO. 340

The respondent respectfully directs this Court's attention to the following cases, comprising a few of the overwhelming and unanimous number of federal district court and state court decisions which have upheld the constitutionality of the Portal-to-Portal Act of 1947:

From the District of Columbia:

Blessing v. Hawaiian Dredging Company, Ltd., 76 F. Supp. 556 (D. D.C. 1948). (Section 9.)

From the First Circuit:

Ferrer v. Waterman Steamship Corporation, 76 F. Supp. 601 (D. P.R. 1948).

Millet v. Bethlehem—Hingham Shipyard (D. Mass. 1948) 15 Labor Cases par. 64,590, 8 W. H. Cases 46.

Mitchell v. Boston Sausage & Provision Co. (D. Mass. 1948) 15 Labor Cases par. 64,589, 7 W. H. Cases 948.

Moeller v. Eastern Gas & Fuel Associates, 74 F. Supp 937 (D. Mass. 1947).

From the Second Circuit:

Abernathy v. General Motors Corporation (S.D. N.Y. 1948) 14 Labor Cases par. 64, 525, 7 W. H. Cases 1027.

Asselta v. 149 Madison Avenue Corporation, 79 F. Supp. 413 (S.D. N.Y. 1948).

Cardinale v. General Motors Corp., 76 F. Supp. 743 (N.D. N.Y. 1947).

Darr v. Mutual Life Insurance Company of N.Y., 72 F. Supp. 752, 78 F. Supp. 28 (S.D. N.Y. 1947).

Genuth v. National Biscuit Co. (S.D. N.Y. 1948) 15 Labor Cases par. 64,741, 8 W. H. Cases 292.

Holland v. General Motors Corporation, 75 F. Supp. 274 (W.D. N.Y. 1947).

Local 626 v. General Motors Corp., 76 F. Supp. 593 (D. Conn. 1947).

Markert v. Swift & Company, (S.D. N.Y. 1948) 15 Labor Cases par. 64,634, 8 W. H. Cases 159.

Sinclair v. United States Gypsum Company, 75 F. Supp. 439 (W.D. N. Y. 1948).

Sochulak v. American Brake Shoe Company, 79 F. Supp. 437 (S.D. N.Y. 1948).

From the Third Circuit:

Battery Workers' Union v. Electric Storage Battery Company, 78 F. Supp. 947 (E.D. Pa. 1948).

Burke v. Mesta Machine Co. (W.D. Pa. 1948) 15 Labor Cases par. 64,673, 8 W. H. Cases 175 (Sections 9 and 11).

Hart v. Aluminum Company of America, 73 F. Supp. 727 (W.D. Pa. 1947).

Hoyt v. Merritt-Chapman & Scott Corp., 79 F. Supp. 106 (D. N.J. 1948).

From the Fourth Circuit:

Seese v. Bethlehem Steel Co., 74 F. Supp. 412 (D. Md. 1947).

From the Fifth Circuit:

Burfeind v. Eagle-Picher Co., 71 F. Supp. 929 (N.D. Tex. 1947).

May v. General Motors Corporation, 73 F. Supp. 878 (N.D. Ga. 1947).

Story v. Todd Houston Shipbuilding Corp., 72 F. Supp. 690 (S.D. Tex. 1947).

From the Sixth Circuit:

Bateman v. Ford Motor Company, 76 F. Supp. 178 (E.D. Mich. 1948).

Boerkoel v. Hayes Manufacturing Corporation, 76 F. Supp. 771 (W.D. Mich. 1948).

Hassel v. Standard Oil Co. of Ohio, (N.D. Ohio 1948) 15 Labor Cases par. 64,593, 8 W. H. Cases 41.

Lasater v. Hercules Powder Co., 73 F. Supp. 264 (E.D. Tenn. 1947).

From the Seventh Circuit:

Ackerman v. J. I. Case Company, 74 F. Supp. 639 (E.D. Wis. 1947).

Bauler v. Pressed Steel Car Co., Inc., (N.D. Ill. 1948) 15 Labor Cases par. 64,569, 8 W. H. Cases 310.

McCalpin v. Magnus Metal Corp. (N.D. Ill. 1948) 15 Labor Cases par. 64,633, 8 W. H. Cases 120.

McLaughin v. Todd & Brown, Inc., (N.D. Ind. 1948) 15 Labor Cases par. 64,606, 7 W. H. Cases 1014.

Smith v. American Can Co. (E.D. Ill. 1948) 14 Labor Cases par. 64,281, 7 W. H. Cases 603.

From the Eighth Circuit:

Bumpus v. Remington Arms Company, Inc., 74 F. Supp. 788 (W.D. Mo. 1947).

Crouter v. Inland Construction Co. (D. Neb. 1948) 14 Labor Cases par. 64,547, 7 W. H. Cases 985.

De Maio v. Grant Storage Battery Company (D. Minn. 1948) 14 Labor Cases par. 64,285, 7 W. H. Cases 721.

Hays v. Hercules Powder Company, 7 F. R. D. 747 (W.D. Mo. 1947).

Hornbeck v. Dain Manufacturing Company (S.D. Iowa 1947) 13 Labor Cases par. 64,055, 7 W. H. Cases 296.

Horner v. McQuay Norris Manufacturing Company (E.D. Mo. 1947) 13 Labor Cases par. 64,086, 7 W. H. Cases 436.

Jackson v. Northwest Airlines, 76 F. Supp. 121 (D. Minn. 1948) (Sections 9 and 11).

Johnson v. Park City Consolidated Mines Company, 73 F. Supp. 852 (E.D. Mo. 1947).

Lockwood v. Hercules Powder Company, 78 F. Supp. 716 (W.D. Mo. 1948).

Plummer v. Minneapolis-Moline Power Implement Company, 76 F. Supp. 745 (D. Minn. 1948).

Reid v. Day & Zimmerman, Inc., 73 F. Supp. 892 (S.D. Iowa 1947).

Sadler v. W. S. Dickey Clay Manufacturing Company, 73 F. Supp. 690 (W.D. Mo. 1947).

Smith v. Cudahy Packing Co., 76 F. Supp. 575 (D. Minn. 1947).

From the Ninth Circuit:

Boehle v. Electro Metallurgical Co., 72 F. Supp. 21 (D. Ore. 1947).

Cochran v. St. Paul & Tacoma Lumber Co., 73 F. Supp. 288 (W.D. Wash. 1947).

Devine v. Joshua Hendy Corporation, 77 F. Supp. 893 (S.D. Cal. 1948).

Ditto v. American Aluminum Company, 73 F. Supp. 955 (S.D. Cal. 1947).

Felton v. Latchford Marble Glass Co., 77 F. Supp. 955 (S.D. Cal. 1948).

Hollingsworth v. Federal Mining & Smelting Company, 74 F. Supp. 1009 (D. Idaho 1947).

Miller v. Howe Sound Mining Co., 77 F. Supp. 540 (E.D. Wash. 1948).

Quinn v. California Shipbuilding Corp., 76 F. Supp. 742 (S.D. Cal. 1947).

Role v. J. Neils Lumber Company, 74 F. Supp. 812 (D. Mont. 1947).

Tully v. Joshua Hendy Corporation (S.D. Cal. 1948) 15 Labor Cases par. 64,696, 8 W. H. Cases 198.

From the Tenth Circuit:

Adkins v. E. I. duPont de Nemours & Co., (N.D. Okla. 1947) 13 Labor Cases par. 64,025, 7 W. H. Cases 298.

Elting v. North American Aviation, Inc., (D. Kan. 1947) 13 Labor Cases par. 64,154, 7 W. H. Cases 491.

McDaniel v. Brown & Root, Inc., (E.D. Okla. 1948) 14 Labor Cases par. 64,511, 7 W. H. Cases 978.

Smith v. Colorado Fuel & Iron Corp. (D. Colo. 1948) 15 Labor Cases par. 64,755, 8 W. H. Cases 307.

From the State Courts:

Kemp v. Day & Zimmerman, ... Iowa ....., 33 N.W. 2d 569 (1948).

Parkhill v. Todd Shipyards Corporation, 190 Misc. 782, 76 N.Y. Supp. 2d 363 (New York, Supreme Court 1948).

Werner v. Milwaukee Solvay Coke Co., 252 Wis. 392, 31 N.W. 2d 605 (1948).